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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK and TOWN OF SOUTHAMPTON, TOWN OF EAST HAMPTON, TOWN OF RIVERHEAD, TOWN OF SOUTHOLD and TOWN OF SHELTER ISLAND; ROBERT T. CAMERON, individually and as Supervisor of the Town of Southampton; EDWARD V. ECKER, individually and as Supervisor of the Town of East Hampton; ROBERT B. VOJVODA, individually and as Supervisor of the Town of Riverhead; LESTER M. ALBERTSON, individually and as Supervisor of the Town of Southold, and EVANS K. GRIFFING, individually and as Supervisor of the Town of Shelter Island,

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS, and TOWN OF HUNTINGTON,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND DISMISS

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INDEX

	PAGE
Jurisdiction	2
Statement	2
Questions Presented	5
ARGUMENT:	
I—There is no reason why the Equal Protection Clause of the Fourteenth Amendment as applied to state legislative bodies should not also apply to municipal levels of government	5
II—The Court need not determine the validity of weighted voting either as provisional or permanent relief	11
Conclusion	12

CASES CITED

Baker v. Carr, 369 U. S. 186 (1962)	5
Reynolds v. Simms, 377 U. S. 533 (1964)	5, 6, 10, 11
Dyer v. Abe, 138 F. Supp. 220 (U.S.D.C. Hawaii, 1956), reversed and dismissed as moot, 256 F. 2d 728 (Ninth Cir., 1958)	6
Gomillion v. Lightfoot, 364 U. S. 339 (1960)	6, 10
Cooper v. Aaron, 358 U. S. 1, 17 (1958)	6, 10
Seaman v. Fedourich, 16 N. Y. 2d 94, 101-02 (1965)	8, 10
Goldstein v. Rockefeller, 45 Misc. 2d 778, 257 N.Y.S. 2d 994, 1000-1001 (Supreme Court, 1965)	9
Ellis v. Mayor, etc. of Baltimore, 353 F. 2d 123 (Fourth Cir., 1965)	10
Moody v. Flowers (U.S.D.C.M.D. Ala., June 10, 1966)	9
Johnson v. Genessee County, Michigan, 232 F. Supp. 567 (E. D. Mich., 1964)	9

PAGE

Muskegon Prosecuting Attorney v. Klevering, 377 Mich. 666, 141 N. W. 2d 120 (Supreme Court, 1966) 9

Miller v. Board of Supervisors of Santa Clara County, 46 Cal. Rptr. 617, 405 P. 2d 857, 860 (Supreme Court, 1965) 8

Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W. D. La., 1964) 8

Ellis v. City Council of Baltimore, 352 F. 2d 123 (Fourth Cir., 1965) 8

Brouwer v. Bronkema, 377 Mich. 616, 141 N. W. 2d 98 (Supreme Court, 1966); but see Muskegon Prosecuting Attorney v. Klevering, 377 Mich. 666; 141 N. W. 2d 120 (Supreme Court, 1966) .. 8

Hanlon v. Towey, 34 L. W. 2654 (Supreme Court, May 20, 1966) 8

Martinolich, et al. v. Dean, et al. (U.S.D.C.S.D. Miss., July 27, 1966) 8

Mauk v. Hoffman, 87 N. J. Super. 276, 209 A. 2d 150 (Superior Court, 1965) 8

Seaman v. Fedourich, 16 N. Y. 2d 94, 209 N. E. 2d 782 (Court of Appeals, 1965) 8

Bailey v. Jones, —— S. Dak. ——, 139 N. W. 2d 385 (Supreme Court, 1966) 8

Davis v. Dusch, —— F. 2d —— (Fourth Cir., May 30, 1966, Docket No. 10592) 8

State ex rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N. W. 2d 249 (Supreme Court, 1965) 8

STATUTES

Section 203 of the Suffolk County Charter (Laws of New York, 1958 ch. 278) 2

Section 153 of the County Law of the State of New York 2

AUTHORITIES

The World Almanac, 1963, p. 252 4

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MOTION TO AFFIRM AND DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to affirm the judgment below on the ground that the questions on which

the decision of the cause depends are so unsubstantial as not to need further argument; and further move to dismiss so much of the appeals as seek to review the propriety of weighted voting as a permanent form of relief, on the ground that such issue is not before the Court.

Jurisdiction

The basis of the Court's jurisdiction is adequately set forth on page 3 of the Jurisdictional Statement, except for the issue of the propriety of weighted voting as a permanent form of relief.

Statement

Appellees, citizens of the United States and of the State of New York, taxpayers of New York State and of Suffolk County, New York, and qualified voters entitled to vote for supervisors in the town, within Suffolk County, of their respective residence, sought and obtained a judgment, declaring invalid under the Equal Protection Clause of the Fourteenth Amendment, the practice whereby each member of the appellant Board of Supervisors cast one vote in acting as a member of the Suffolk County Board of Supervisors, the elective governing and legislative body of the County, which practice is embodied in Section 203 of the Suffolk County Charter (Laws of New York, 1958, ch. 278) and Section 153 of the County Law of the State of New York.

Each individual appellee resides in one of the heavily populated towns of Suffolk County.

Each town supervisor, in addition to serving as the chief executive of his town, to which position he is elected by the voters of his town, also serves as a member of the County Board of Supervisors where, before the lower

Court's decision, he cast one vote, the voting power of the Board being distributed solely on a geographic basis of one vote per town.

The populations of the ten towns of Suffolk County as set forth in the United States Census of Population 1960, Number of Inhabitants, New York Final Report (P.C. [1] 34A) were respectively as follows:

Shelter Island	1,312
East Hampton	8,827
Southold	13,295
Riverhead	14,519
Southampton	26,861
Smithtown	50,347
Brookhaven	109,900
Huntington	126,221
Babylon	142,309
Islip	172,959

The system which the Court below held unconstitutional permitted supervisors representing approximately 18% of the County population to enact legislation not favored by approximately 82% of the population; and allowed supervisors representing approximately 10% of the population to prevent legislation favored by approximately 90% of the population.

As stated by the lower Court in its decision of February 1, 1965 (Reprinted, Jurisdictional Statement, Appendix B, p. 23a):

> "The basic theory of the action is disparity of representation. Concerning disparity, there can be no question. The ten towns of Suffolk were never of equal population; town lines were not drawn on a population basis and did not profess to be so drawn. In addition, over the years radical population changes as a result of economic and industrial developments have taken place in eastern Long Island. The locations of large defense plants in this area has brought thousands of

families into the westerly towns of Suffolk County. The eastern area remains thinly populated; the western has become rather densely populated. Thus, for example, the town of Shelter Island finds itself about as it was 150 years ago with its population stabilized at some 1,300 persons whereas the towns of Islip, Huntington and Babylon, to take extreme cases, have some 172,000, 126,000 and 142,000 persons, respectively."

Based upon the 1960 Census, Suffolk County's population is larger than the population of eight states, and its 922 square miles is comparable to Rhode Island's 1,058 square miles. (U. S. Census, 1960, as reported in The World Almanac, 1963, p. 252.)

On June 15, 1966 the Court below entered a judgment declaring the Suffolk County charter unconstitutional and directed, as interim relief, that each supervisor cast at all future meetings of the County Board of Supervisors (other than for the purpose of voting whether to appeal from the judgment) a number of votes equal to the quotient of the population of this town by 5,000, with each supervisor having at least one vote. The Court further directed appellant Board to submit a plan or plans to the County's electorate at the November, 1966 election so that a proper County legislature may be elected to take office no later than January 1, 1968.

The Court further directed submission of proposed reapportionment plans to it and retained jurisdiction to pass upon their probable constitutionality.

Thereafter, on August 22, 1966, a local law which had been declared probably constitutional by the Court below (Jurisdictional Statement, Appendix C, pages 53a-55a) was adopted by appellant Board, subject to approval by the electorate at the November, 1966 general election. A stay of the interim relief was granted for a seven-day period

by the District Court to permit an application for a stay pending appeal to a Justice of this Court. Application for such stay pending appeal was made by appellants and denied by Mr. Justice Black on July 2, 1966.

Questions Presented

1. Is there any reason why the Equal Protection Clause of the Fourteenth Amendment as applied to state legislative bodies of government in *Baker* v. *Carr*, 369 U. S. 186 (1962) and *Reynolds* v. *Simms*, 377 U. S. 533 (1964) should not also apply to municipal levels of government?

2. Should this Court consider the constitutionality of weighted voting either as provisional or permanent relief?

ARGUMENT

I

There is no reason why the Equal Protection Clause of the Fourteenth Amendment as applied to state legislative bodies should not also apply to municipal levels of government.

The pronouncements in *Baker* v. *Carr*, 369 U. S. 186 (1962) and in *Reynolds* v. *Simms*, 377 U. S. 533 (1964) that an arbitrary impairment of one's vote by means of an invidiously discriminatory geographic classification violates the Equal Protection Clause of the Fourteenth Amendment was not, and could not have been, intended to apply exclusively to legislative representation at the state level. The citizens of Suffolk County and other municipalities must be afforded the same constitutional guarantees which they are afforded as citizens of their state. The Constitution draws no distinction between citizens of a state (*Baker* v. *Carr, supra*), citizens of a territory (*Dyer* v. *Abe*,

138 F. Supp. 220 [U. S. D. C. Hawaii, 1956], reversed and dismissed as moot 256 F. 2d 728 [Ninth Cir., 1958]), and citizens of a municipality (*Gomillion* v. *Lightfoot*, 364 U. S. 339 [1960]).

Suffolk County, in common with other municipalities, is a creature of the state and the repository of all of the powers which have been delegated to it by the state. The County possesses no independent sovereignty (*Reynolds* v. *Simms*, 377 U. S. 533, 575 [1964]), and it cannot be used by the state as a means of circumventing constitutionally protected rights (*Gomillion* v. *Lightfoot*, 364 U. S. 339 at 347 [1960]). Thus, as stated by this Court in *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958):

> "[T]he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action . . . or whatever the guise in which it was taken. . . ."

And as reiterated in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 344-45 (1960):

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . .
>
> • • •
>
> "The opposite conclusion . . . would sanction the achievement by a State or any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' "

These principles have been applied to the question of proper representation on the municipal legislative level of government by an impressive body of authority.

The New York Court of Appeals has stated:

"The present action was, of course, prompted by recent Supreme Court cases holding that the equal protection clause of the Fourteenth Amendment requires that representation in both houses of a state's legislature be substantially proportionate to the number of people represented under the principle of 'one person, one vote'. There can be little doubt, and it is not disputed by the defendants, that that principle is applicable to elective legislative bodies exercising general governmental powers at the municipal level (c.f. *Reynolds* v. *Sims*, 377 U. S. 533, 575; *Gomillion* v. *Lightfoot*, 364 U. S. 339), and such has been the conclusion reached by several courts called upon to consider the question.

"It is axiomatic that local governmental units are creations of, and exercise only those powers delegated to them by, the State (N. Y. Const., art. IX, §§ 1, 2; Municipal Home Rule Law, §§ 10, 11) and, certainly, if the latter may exercise its legislative powers only in a body constituted on a population bases, any general elective municipal organ to which it delegates certain of its powers must, by a parity of reasoning, be subjected to the same constitutional requirement. Viewed in another way, if, as seems evident, the thrust of the Supreme Court's decisions is that it is inherent within the concept of 'equal protection' that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating, so far as that right is concerned, between the general governmental business carried on in the highest legislative organs of the State and that conducted, by virtue of a delegation of authority, in municipal lawmaking bodies. (See, generally, Weinstein, The Effect of the Federal Reapportionment Decisions on Counties

and Other Forms of Municipal Government, 65 Col. L. Rev. 21)." (*Seaman* v. *Fedourich*, 16 N. Y. 2d 94, 101-02 [1965]).

Virtually every other court which has considered the question is in accord:

California	*Miller* v. *Board of Supervisors of Santa Clara County*, 46 Cal. Rptr. 617, 405 P. 2d 857, 860 (Supreme Court, 1965);
Louisana	*Simon* v. *Lafayette Parish Police Jury*, 226 F. Supp. 301 (W. D. La., 1964);
Maryland	*Ellis* v. *City Council of Baltimore*, 352 F. 2d 123 (Fourth Cir., 1965);
Michigan	*Brouwer* v. *Bronkema*, 377 Mich. 616, 141 N. W. 2d 98 (Supreme Court, 1966); *but see Muskegon Prosecuting Attorney* v. *Klevering*, 377 Mich. 666; 141 N. W. 2d 120 (Supreme Court, 1966);
Minnesota	*Hanlon* v. *Towey*, 34 L. W. 2654 (Supreme Court, May 20, 1966);
Mississippi	*Martinolich, et al.* v. *Dean, et al.* (U.S.D.C.-S.D. Miss., July 27, 1966);
New Jersey	*Mauk* v. *Hoffman*, 87 N. J. Super. 276, 209 A. 2d 150 (Superior Court, 1965);
New York	*Seaman* v. *Fedourich*, 16 N. Y. 2d 94, 209 N. E. 2d 782 (Court of Appeals, 1965);
South Dakota	*Bailey* v. *Jones*, —— S. Dak. ——, 139 N. W. 2d 385 (Supreme Court, 1966);
Virginia	*Davis* v. *Dusch*, —— F. 2d —— (Fourth Cir., May 30, 1966, Docket No. 10592);
Wisconsin	*State ex rel. Sonneborn* v. *Sylvester*, 26 Wis. 2d 43, 132 N. W. 2d 249 (Supreme Court, 1965);

contra:

Alabama *Moody* v. *Flowers* (U.S.D.C.M.D. Ala., June 10, 1966);

Michigan *Johnson* v. *Genessee County, Michigan*, 232 F. Supp. 567 (E. D. Mich., 1964); *Muskegon Prosecuting Attorney* v. *Klevering*, 377 Mich. 666, 141 N. W. 2d 120 (Supreme Court, 1966).

The Attorney General of the State of New York has taken the following position, as quoted in *Gollstein* v. *Rockefeller*, 45 Misc. 2d 778, 257 N.Y.S. 2d 994, 1000-1001 (Supreme Court, 1965):

> "After careful study of the available case law upon the subject; upon due consideration of the relative benefits and evils which can result both from a failure to apply that proposition of law and also from its application; after attempting to weigh the relative good and relative evil, both from the standpoint of the present condition of apportionment in the several cities and counties within the State and from the probable future condition, should the present growth rate and fluctuating population patterns continue at the present or a faster pace (and we are assured by experts in the field of future planning that the change will continue at a constantly increasing rate into and through the foreseeable future); the position necessarily now taken by the State respondents is that the equal protection clause does and must apply to local legislative bodies within this State and that the trials, inconvenience and evil of upheaval due to the application of the proposition are less to be feared, if met with intelligence, cooperation and good will, than the evil of a constantly increasing and more acute imbalance of representation of citizens in their local legislative bodies due to the failure to apply the proposition."

In *Ellis* v. *Mayor, etc. of Baltimore*, 353 F. 2d 123 (Fourth Cir., 1965), Judge Sobeloff, speaking for a unanimous Court, disposed of the issue in laconic fashion:

> "The merit of this part of the decision is not, and could not successfully be contested in this appeal, for the 'one man, one vote' principle, infra, 352 F. 2d 126, logically applies to councilmanic no less than to statewide apportionment."

While in a technical sense the issue presented herein has not squarely been decided by this Court, application of "one man, one vote" to municipal levels of government is now firmly accepted throughout the country and is supported by this Court's decisions in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), *Cooper* v. *Aaron*, 358 U. S. 1 (1958), and specifically its language in *Reynolds* v. *Sims*, 377 U. S. 533 at 575 (1964) (referred to by Judge Fuld for a unanimous New York Court of Appeals in *Seaman* v. *Fedourich, supra*, 16 N. Y. 2d at 101):

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."

Since municipalities possess no independent sovereignty, they are subject to all of the provisions of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment.

Although the Tenth Amendment affords the States an element of sovereignty as to those powers preserved to them by the Constitution, *Reynolds* v. *Sims, supra*, determined, nonetheless, that those powers cannot be exercised in a fashion that will result in invidious discrimination in voter representation. There is no reason why invidious discrimination resulting from a state's delegation of its powers should constitute an exception to this rule.

II

The Court need not determine the validity of weighted voting either as provisional or permanent relief.

There is no need to determine upon this appeal the validity of weighted voting as either a temporary or permanent plan of representation. The June 15, 1966 judgment appealed from (Jurisdictional Statement, Appendix A, p. 11a) directed that a permanent plan of reapportionment be submitted to the voters at the November, 1966 general election, to take effect no later than January 1, 1968.

The Court below thus limited its interim relief to a maximum 18½-month period, rendering it of only transitory importance and too unsubstantial to be considered by this Court.

Moreover, the interim relief was adopted only after the lower Court, by its February 1, 1965 decision and March 3, 1965 order (Jurisdictional Statement, Appendix B, pp. 20a-35a) afforded ample opportunity for the governmental bodies concerned to remedy the malapportionment, and such bodies failed to act. The New York State legislature during the period February, 1965—June, 1966 was preoccupied with its own reapportionment problems, and the appellant Board was paralyzed by a 5-5 legislative deadlock. Since biennial elections for town supervisor are scheduled for November, 1967, the lower Court took appropriate action to insure that no further elections would be conducted under the invalid scheme. *Reynolds* v. *Sims*, 377 U. S. 533, 585 (1964).

Insofar as the appellants seek to review the permanent plan of reapportionment, their appeal should be dismissed. No permanent plan has as yet become law since the Local Law adopted by appellant Board on August 22, 1966 is

subject to approval by the voters at the November 1966 general election (Jurisdictional Statement, p. 55a). Upon its adoption, appropriate attack may be made upon it by further proceedings in the Court below, which retained jurisdiction for such purpose (Jurisdictional Statement, p. 35a).

The August 4, 1966 decision and order of the lower Court are in the nature of an advisory opinion and are not appealable; and, in any event, no separate appeal has been taken therefrom.

Conclusion

The order of the District Court of the United States for the Eastern District of New York entered June 15, 1966 should be affirmed insofar as it invalidated Section 203 of the Suffolk County Charter; ordered an interim weighted voting plan of representation to take immediate effect; and directed submission of a permanent plan of reapportionment to the voters of Suffolk County at the November, 1966 general election, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; and the appeals, insofar as they seek to review the propriety of weighted voting as a permanent form of relief, should be dismissed on the ground that such issue is not before this Court, which lacks jurisdiction to grant such review.

Respectfully submitted,

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